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No. 04-659

JAN 18 2005
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IN THE

Supreme Court of the United States

NEAL JACOBS,

Petitioner,

v.

GEORGE P. VIENER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Are constitutional questions presented under the developing Pennsylvania case law regarding minority shareholders rights where a controlling shareholder of a small closely held family business misappropriates substantial cash and corporate property, fires and freezes out the business' co-founder for "asking questions" about his defalcations, then transfers productive corporate equipment and capital to his own businesses in Mexico and, in response to co-founder's ongoing efforts to prevent the destruction of the business, stops taking orders and bankrupts the company and where the court awards 1.2 million dollars in compensatory damages and a lesser amount of punitive damages on account of this outrageous course of conduct? To be answered in the negative.

Does the Superior Court's order remanding the case for a new trial as to damages only violate Defendant's due process rights? To be answered in the negative.

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SUMMARY OF ARGUMENT

This is a minority shareholder freeze-out case that arose and was adjudicated under the common law of the Commonwealth of Pennsylvania. No federal law or interest applies to these private closely held Pennsylvania apparel companies. No constitutional right protects the controlling shareholder from liability for booting out his partner and transferring their productive assets to Mexico for use by himself and his female friend, the irrepressible Ms. Kim Van Vu. No federal law or policy preempted the award of compensatory damages for the majority shareholder's decision to bankrupt the domestic companies while they were still viable. The trial court's award to Plaintiff of the value of his ownership interests before Mr. Jacobs rid himself of Mr. Viener and set about to bankrupt the businesses they founded and built together in favor of his Mexican ventures with his newly found partner, Ms. Vu, was fair compensation and fairly characterized as compensatory damages. Punitive damages were awarded under exacting state rules for fraud claims no less rigorous than federal standards. And the state court rulings anticipated and conformed to the one-to-one ratio established by *State Farm*. Even were some federal issue presented, the petition is premature since the appellate court returned the case to the trial court for recalculation of the amounts of both compensatory and punitive damages.

A. NO ISSUE OF PROPORTIONALITY UNDER STATE FARM IS RIPE FOR REVIEW.

State Farm proportionality is not ripe for review. The Superior Court remanded to the trial court instructing it to recalculate the amount of compensatory and punitive damages. In its remand, the Superior Court noted that the

> . . . current ratio between punitive damages and compensatory damages is less than a 1 to 1 ratio. However, as the ratio between punitive damages and compensatory damages in this case may change as a result of our remand, we reach a decision only as to the *propriety* of punitive damages in this case so that, on remand, the trial court may recalculate the *amount* of the punitive damage award, if necessary, to comport with Mr. Justice Kennedy's admonition.

State Farm, 834 A.2d 546, 2003 Pa. Super. 324 at ¶41.

Far from preventing a disproportionate punitive damage award, this Certiorari Petition was simply filed to further delay the assessment of compensatory and punitive damages for Defendants' "wanton neglect and bad faith" which led to the "ultimate failure" of the corporation co-founded by the Plaintiff. *Viener v. Jacobs*, 834 A.2d at 561; 2003 Pa. Super 324 at ¶39. Contemporaneously with filing of this Certiorari Petition, Defendant has made repeated efforts to stay the lower court's determination of the proper amount of compensatory and punitive damages. See attachments.

B. THE LOWER COURT CORRECTLY DETERMINED THE MEASURE OF DAMAGE.

As the lower court noted, "a principal harm caused by the misconduct of Jacobs was the destruction of the total value of Viener's ownership interest in NGN and related entities." *Viener v. Jacobs*, 52 Pa. D&C. 4th at 367 (Finding of Fact #84). The trial court concluded and the Pennsylvania Superior Court affirmed that where the Defendant had destroyed the total value of Plaintiff's ownership interest in these small closely held companies, the measure of appropriate compensatory damages was to "provide the minority shareholder with the fair value of his interest in the corporation" that he had lost through the freeze-out and other breaches of fiduciary duty. *Viener v. Jacobs*, 51 Pa. D&C. 4th at 297.

The Viener case represents but one small step in the development of Pennsylvania corporate law governing fiduciary duties owed to minority shareholders in closely held Pennsylvania corporations. While protecting the rights of minority shareholders in closely held family businesses is a perennial task of state courts, the Pennsylvania courts' ruling in this matter touches no federal policy or precedent and raises no constitutional questions. The Pennsylvania Superior Court has simply affirmed that when a controlling shareholder bankrupts a closely held business through unethical and illegal conduct, a minority shareholder may recover the value of his interest in the corporation lost through the freeze-out and other breaches of fiduciary duty. *Viener v. Jacobs*, 834 A.2d at 558, 2003 Pa. Super 324 at ¶28. This was no innovation in Pennsylvania law and presents no federal issue for further review. *See Orchard v. Covelli*, 590 F. Supp. 1548 (W.D. Pa. 1984).

The trial court's findings were concisely summarized by the Superior Court as follows:

> ¶ 15 The trial court's Findings of Fact in its Opinion of June 30, 2000, reveal the following: Viener and his father were in the textile business in the Reading area for more than 50 years. Jacobs was employed by the Viener family business and was eventually offered a 20% ownership interest in the Viener family business. Viener and Jacobs began producing garments for a company that employed Rush, who was a college friend of Viener. Together, Viener, Rush and Jacobs decided to begin their own company and formed NGN on January 1, 1983. The three owned 33 1/3 % interests in NGN. Viener served as president/ secretary/treasurer of NGN, Jacobs and Rush served as vice- presidents. The three were subject to a shareholder's agreement that guaranteed each shareholder that he could sell his shares at the current book value of NGN to the other shareholders.
>
> ¶ 16 The present case arose when Viener expressed concerns in 1994 regarding questionable cash payments authorized by Jacobs, whose duties were to manage manufacturing and quality control, and made by NGN to one of its subcontractors, N.V. Sportswear and its majority shareholder, [Kim] Van Vu. See Viener, 51 Pa. D&C. 4th at 269. Initially, Viener acquiesced to the unorthodox cash payments based on the advice of Joffred, then NGN's auditor. Id., 51 Pa. D&C.

4th at 270. At that time, Rush indicated that he wished to make Joffred an officer in the company. Initially, Viener supported that plan and wanted to employ Joffred as chief financial officer. Shortly thereafter, Jacobs and Rush voted to remove Viener as president of NGN against Viener's wishes and demoted him to vice-president. [FN7] Joffred then replaced Viener as president of NGN. Eventually, Joffred suspended NGN's practice of making cash payments to subcontractors. Nevertheless, in late 1994, at Jacobs' direction, Crown-Globe, Inc. (Crown-Globe), another subcontractor of NGN, generated false invoices of $53,276.59 to reflect "price adjustments" to NGN. Id., 51 Pa. D&C. 4th at 272. Thereafter, Jacobs caused NGN to pay the $53,276.59 to Crown-Globe, who in turn repaid Jacobs. Jacobs then paid the $53,276.59 directly to Van Vu. Id., 51 Pa. D&C. 4th at 273.

FN7. Viener retained the same salary in the vice-president position that he had as president.

¶ 17 Viener questioned Joffred via e-mail regarding the cash payments. At trial, Joffred confirmed that the invoices were fraudulent and were an inappropriate attempt by Jacobs to divert cash payments to Van Vu and N.V. Sportswear in contravention of corporate policy. Viener, 51 Pa. D. & C. 4th at 274. Thereafter, Joffred prevented NGN from paying to Crown-Globe a second series of invoices that totaled $48,135.61. Viener was then voted out of his position as vice-president of NGN by Jacobs and Rush on Joffred's

recommendation. Evidence presented at trial indicates that Joffred intended to fire Viener as vice-president for "wasting people's time with questions." N.T. Trial, 8/11/1997, at 134-135. Viener remained on NGN's board of directors after being fired but his participation on the board was limited severely. Following Viener's termination, NGN ceased its regular practice of quarterly board meetings, and the locks and doors at NGN were changed to permit Viener access to NGN's facilities only during hours of regular operation. Employees of NGN were warned that if they spoke to Viener, they would be fired. Finally, Viener was excluded from voting on issues of employee compensation because Jacobs and Rush established a committee consisting of all of the other shareholders, directors and Joffred to handle those matters.

¶ 18 In late 1995, following Viener's termination, the sales of both NGN and RGC fell off, and they sustained losses of approximately $900,000. In 1996, NGN and RGC lost $2.33 million. At this time, NGN loaned textile equipment valued at approximately $218,000 to Amex, a corporation in Mexico, at Jacobs' request. Viener, 51 Pa. D. & C. 4th at 276. This equipment was collateral for a loan held with CoreStates Bank, and the loan documents with CoreStates Bank prevented the transfer of these assets. Moreover, despite dwindling capital accounts, Jacobs withdrew $202,216.67 from his loan account for the purpose of purchasing the equipment loaned to Amex.

[FN8] Neither the equipment purchased nor the funds used to purchase the equipment were returned to NGN by Jacobs, instead, part of the equipment located at Amex was transferred to Kimmex, a second facility in Mexico owned by Jacobs and Van Vu. [FN9] The balance of the equipment at Amex was sold, and the funds acquired from the sale were reinvested in equipment for Kimmex.

FN8. The shareholder loan accounts contributed to NGN's working capital and earned interest at 12% per annum. The shareholders took their profit distributions and loaned money back to NGN as part of its capital account. There were no agreements or understandings as to the terms or timing of loan payments. The shareholders made advances or withdrawals irregularly. Viener, 51 Pa. D. & C. 4th at 267.

FN9. We note that Viener was never given an opportunity to invest in Kimmex.

¶ 19 While the Kimmex transactions were taking place, Jacobs allowed his responsibilities at NGN to lax. As a result, J.C. Penney, a major client of NGN, demanded that Joffred take over responsibility for quality control because of its concerns regarding the quality of NGN's merchandise and the timeliness of deliveries. Viener, 51 Pa. D. & C. 4th at 278. Joffred took over quality control from Jacobs, but NGN's viability continued its rapid decline, and the company ceased operations on August 31, 1997. Id., 51 Pa. D. & C. 4th at 279-280.

The trial court, referencing specific portions of the record, made even more strongly worded findings concerning the Jacobs/Crown-Globe/N.V. Sportswear connection. In addition to stealing corporate assets and utilizing corporate funds to set up Mexican ventures that replaced NGN, the trial court also found that

> two months before the trial in this lawsuit, the Defendant, with his coconspirators, stopped accepting orders for NGN and RGC, despite the fact that during the prior six months NGN and RGC had sold approximately 18 million dollars worth of goods, had paid off its $500,000 over-advance and was still going concern.

From this, the court concluded that Jacobs had intentionally destroyed the Viener family business and siphoned off that company's productive assets for his own pecuniary benefit. The court awarded Viener the fair market value of his interest in NGN and RGC immediately before the freeze-out as compensation for Jacobs' destruction of the domestic businesses for his own benefit. There was no fundamental unfairness or infirmity in the court's selection of its remedy — just the thoughtful application of state precedent to conduct whose venality and outrageousness was, fortunately, largely unprecedented.

C. THE SUPERIOR COURT'S REMAND FOR A RECALCULATION OF DAMAGES WAS NOT UNCONSTITUTIONAL.

The Superior Court remanded to the lower court to correct the expert's "computational error" in fixing compensatory damages. Plaintiff's expert treated RGC as a

"break even entity" without sufficient factual support; thus, his valuation failed to account for the fact that Viener owned 25% of RGC and 33% of NGN. As the Superior Court noted, ". . . because Willis failed to assess a separate value of RGC, it is impossible for this court to correct his computational error . . .". *Viener*, 834 A.2d at 546, ¶34. The Superior Court's decision to remand for a new trial limited to the amount of compensatory and punitive damages involves no new or novel application of Pennsylvania law that deprived Defendant of due process. Rather, the Pennsylvania rule is, if a trial court making a damage award based upon the evidence before it miscalculates the award or award some component of damages it should have not awarded, the Order on Appeal should be reversed and remanded to allow the lower court to cure its mistake, not to award damage to the other party. *See Kiser v. Schulte*, 538 Pa. 219, 233, 648 A.2d 1, 8 (1994) ("A new trial limited to the issue of damages will be granted where: (i) the issue of damages is not intertwined with the issue of liability and (ii) where the issue of liability has been . . . fairly determined.")

Punitive Damages Were Properly Awarded Under Pennsylvania Law and the U.S. Constitution

There was ample evidence of Jacobs' reprehensible behavior in this record to support an award of punitive damages. In *State Farm*, 123 S. Ct. 1521 and *BMW of North America v. Gore*, 517 U.S. 599 (1996), the U.S. Supreme Court laid out factors pertinent to awarding punitive damages. In *State Farm* the U.S. Supreme Court stated:

> [T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's

> conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

In this case, Defendant Jacobs siphoned corporate cash through his business associate and partner, Ms. Vu, removed substantial productive assets of the company to Mexico, and used company property and other substantial productive assets for his own Mexican ventures, froze Viener out to prevent him from asking questions about Jacobs' ongoing fraudulent schemes, and having taken productive assets across the border, bankrupted NGN when it was still a viable company. The trial court found evidence of bad motive; the Defendant's conduct was not an isolated incident. Rather, the court found numerous specific actions to be indicative of malice or reckless indifference toward Viener. Moreover, following Viener's termination and lockout in 1994, he was helpless to prevent Jacobs' ongoing self-dealing and conversion of NGN's assets. *See* 52 Pa. D&C 4th at 367-368 (Findings of Fact ##84-100). During the great part of Jacobs' course of conduct, Viener was indeed a victim having financial vulnerability. Thus, three of the five Gore factors

are satisfied. Jacobs' conduct was legally reprehensible under United States Supreme Court and Pennsylvania standards, and therefore, the Superior Court did not error when it held that punitive damages had been appropriate.

The Pennsylvania Superior Court plainly articulated why punitive damages were necessary and appropriate.

> ¶ 39 Jacobs argues that our holding in *Pittsburgh Live, Inc. v. Servov*, 419 Pa. Super. 423, 615 A.2d 438 (1992), requires this court to reverse its award of punitive damages. We disagree. In *Servov*, we held that when fraud is the basis of compensatory damages, the same fraudulent conduct is not sufficient to base an award of punitive damages without a showing of acts of malice, vindictiveness or a wholly wanton disregard of the rights of others. *Servov,* 615 A.2d at 442. We have reviewed the record of this case extensively, and we are satisfied that the trial court acted properly in assessing punitive damages against Jacobs. As the facts presented above demonstrate, Jacobs' actions (with Rush's assent) led to the usurpation of Viener's right to participate in the governance of a corporation that Viener co-founded. As the trial court found, Jacobs' misuse of corporate funds and property coupled with his failure to undertake sufficient measures to procure the continued success of NGN led to its ultimate failure. We agree with the trial court's conclusion that minority shareholders in closely-held corporations are particularly vulnerable to this type of wanton neglect and bad faith, and it is therefore necessary to punish this behavior to ensure that it will not occur in future cases.

The Jacobs Certiorari Petition relies heavily on his own discredited version of events. Plainly, Petitioner's credibility was for the trial court to determine and no appeal to the U.S. Supreme Court lies from the lower court's credibility decisions. The court's determination that Jacobs testified untruthfully was buttressed by his own misconduct. Following the determination of his liability, Jacobs made repeated fraudulent transfers and deliberately misrepresented his "net worth" to the lower court, making the trial court's decision he lacked veracity self-evidently correct. 52 Pa. D. & C. 4th at 368-373 and 384-385.

> The trial court was not swayed by the testimony presented with regard to Viener's alleged mismanagement of NGN, no doubt due to both the evidence presented by Viener indicating that Jacobs (and Rush) limited Viener's role as a shareholder-director, and the self-dealing practices of Jacobs that occurred before and after Viener's termination. Of course, the trial court, as fact-finder, was free to believe all, part or none of the testimony presented and weigh its credibility. *See Majczyk v. Oesch*, 789 A.2d 717, 726 (Pa. Super. 2001). The trial court heard all testimony, weighed it and found that Jacobs' testimony was not credible. Therefore, we discern no error on the part of the trial court when it concluded that Jacobs breached his fiduciary duty to Viener.

Petitioner cannot transform Jacobs' ongoing course of theft, misuse of corporate property, misappropriation of assets, or theft of corporate opportunity that led to the

destruction of this business into separate discrete and isolated events.

> Jacobs . . . promoted his self-interests with his business associate, Ms. Van Vu, at the expense of the minority shareholder. He misused his power by promoting his personal interests at the expense of the corporate interests by, inter alia, creating fraudulent schemes to circumvent company policy. This conduct is wantonly tortious, despite the fact that the books were later "reconciled" to justify it. Jacobs cannot explain the loss of significant amounts of NGN equipment even though he "managed" NGN's liquidation.
>
> He reduced the company's working capital, at a time when it was short on cash, to pursue his own interests in Mexico. He converted NGN's equipment. Jacobs failed to use his best efforts to procure the continued existence of NGN. All of this came at the expense of NGN and of Viener, whose own interest in the company became worthless after Jacobs' failure to protect it. Viener has been denied his proper share of the benefits accruing from the company.
>
> There are few remedies available for minority shareholders in closely-held corporations under these circumstances. They are particularly vulnerable to the majority who can destroy their interests with impunity by trying to hide behind the business judgment rule. Such harm must be punished and, thus, deterred. We will impose punitive damages in a reasonable amount to

> punish Jacobs for his self-dealing and outrageous conduct which was a breach of his duty of loyalty to Viener. Furthermore, Jacobs has deliberately misrepresented his net worth to this court. In fact, Jacobs thumbed his nose at the court with his testimony.

52 Pa. D. & C. 4th at 383-384.

In its Memorandum Opinion of October 25, 2001, the trial court also stated:

> When Viener sought redress with the court, Jacobs and Rush responded by failing to protect Viener's interests, as it was their duty to do. This is above and beyond the wantonly tortious acts of Jacobs in pursuing his self-interest by creating fraudulent schemes to divert cash to Ms. Van Vu and by converting company property for his own use and benefit. We felt it imperative to punish such outrageous conduct by a person who used the power and position he had to do with the company's assets despite holding a position of trust.

Much of Petitioner's argument consists in separating each of Jacobs' defalcations and ignoring the connections between them. Since the lower court concluded those defalcations were part of a single course of conduct which destroyed the Plaintiff's business and the value of his holdings in that business, Petitioner's argument that these were isolated events that do not merit an award of punitive damages necessarily fails. The lower court's Findings of Fact were adequately supported in the record and were specifically

affirmed by the Superior Court which refused to credit Jacobs' version of events. There is simply no room for argument that punitive damages were constitutionally impermissible punishment for Jacobs' ongoing "acts of malice, vindictiveness and wholly wanton disregard of the rights of others."

SUMMARY AND CONCLUSIONS

This Petition for Certiorari is at best premature and at worst a deliberate effort to delay conclusion of this case in the state court. As of the time this Certiorari Petition was filed, neither the amount of compensatory damages nor the amount of punitive damages had even been settled in the State Court proceedings. The Superior Court remanded the case to the lower court with the following instructions:

> ¶ 41 Nevertheless, because we find it necessary to remand for a recalculation of compensatory damages, we do not reach Jacobs' argument that the *amount* of punitive damages awarded was unconstitutionally excessive. We are guided in our judgment by the recent decision of the United States Supreme Court in *State Farm Mutual Automobile Ins. Co., v. Campbell*, __ U.S. __, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). Writing for the Court, Mr. Justice Kennedy stated, "Our jurisprudence and the principles it has now established demonstrate [. . .] that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *562 *State Farm*, at __, 123 S.Ct. at 1524. The current ration between punitive damages and

> compensatory damages is less than a 1 to 1 ratio. However, as the ratio between punitive damages and compensatory damages in this case may change as a result of our remand, we reach a decision only as to the *propriety* of punitive damages in this case so that, on remand, the trial court may recalculate the *amount* of the punitive damage award, if necessary, to comport with Mr. Justice Kennedy's admonition.

Given his ongoing misconduct, it is not surprising that Petitioner has sought to use these proceedings to delay or prevent a final determination of his liability for compensatory and punitive damages by besieging the state court with stay requests based upon the pendency of this petition. The ultimate injustice and deprivation of due process would be that the corporate thief go unpunished. Accordingly, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — DEFENDANT NEIL JACOBS' MOTION FOR CONTINUANCE OF PRETRIAL CONFERENCE IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA DATED DECEMBER 22, 2004

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA

No. 00-63 85

GEORGE P. VIENER,

Plaintiff

v.

NEAL JACOBS, NORMAN RUSH, MICHAEL A. JOFFRED, ALLEN FRIEDMAN, N.G.N., INC., READING GARMENT COMPANY, INC., ELLMAR MANUFACTURING, INC., NEGAN LEASING, INC., ENERGY KNITS, INC., READING DYEING AND FINISHING, INC., LITTLE CREEK MILLS, INC., LCMA, INC., AMITY FINISHING, INC., AND G.N.K. PARTNERSHIP,

Defendants

DEFENDANT NEAL JACOBS' MOTION FOR CONTINUANCE OF PRETRIAL CONFERENCE

Defendant Neal Jacobs ("Jacobs"), through his undersigned counsel, hereby moves for a continuance of the

hearing in the above-captioned matter presently scheduled and in support thereof avers as follows.

1. The Court has scheduled a pretrial conference for January 10, 2005.

2. The undersigned counsel has a pre-planned prepaid family vacation to Florida from January 7, 2005 until January 15, 2005.

3. The undersigned counsel will also be out of state at a prepaid conference in Florida from February 2, 2005 through February 4, 2005 and is attached for a hearing on January 27, 2005.

4. The undersigned counsel will otherwise make himself available at the Court's convenience.

WHEREFORE, defendant Neal Jacobs respectfully requests that the Court grant this motion and order the continuance of this conference by entering an Order substantially in the form attached.

Dated: December 22, 2004

STEVENS & LEE

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APPENDIX B — DEFENDANT NEIL JACOBS' MOTION FOR CONTINUANCE OF PRETRIAL CONFERENCE IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA DATED NOVEMBER 24, 2004

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA

No. 00-6385

GEORGE P. VIENER,

Plaintiff

v.

NEAL JACOBS, NORMAN RUSH, MICHAEL A. JOFFRED, ALLEN FRIEDMAN, N.G.N., INC., READING GARMENT COMPANY, INC., ELLMAR MANUFACTURING, INC., MEGAN LEASING, INC., ENERGY KNITS, INC. READING DYEING. AND FINISHING, INC., LITTLE CREEK MILLS, INC., LCMA, INC., AMITY FINISHING, INC., AND G.N.K. PARTNERSHIP,

Defendants

DEFENDANT NEIL JACOBS' MOTION FOR CONTINUANCE OF PRETRIAL CONFERENCE

Defendant Neal Jacobs ("Jacobs"), through his undersigned counsel, hereby moves for a continuance of the

hearing in the above-captioned matter presently scheduled and in support thereof avers as follows:

1. On August 16, 2004, the Pennsylvania Supreme Court denied Jacobs' petition for allowance of appeal.

2. On November 12, 2004, Jacobs filed an appeal of the issues of the awarding punitive damages and of reopening the record to allow additional evidence to the United States Supreme Court.

3. Until the Supreme Court appeal is completed, the trial court lacks jurisdiction to proceed with a pretrial conference or, in the alternative, the trial court should in its discretion not hold such a conference until after the appeal is completed.

4. Except if a special exception is specifically prescribed in Pa.R.A.P. 1701(b), aft :r an appeal is taken, "the trial court or other government unit may no longer proceed further in the matter." Pa.R.A.P. 1701(a). None of the special exceptions are applicable here.

5. "Appeal" is defined in Pa.R.A.P. 102 as "[a]ny petition for other application to a court for review of subordinate governmental determinations. The term includes an application for certiorari under 42 Pa.C.S. Section 934 (writs of certiorari) or under any other provision of law. Where required by the context, the term includes proceedings on petition for review."

6. As the Pennsylvania Superior Court stated in holding that a trial court lacked jurisdiction while a petition was

pending in the United States Supreme Court, "these rules clearly encompass a petition for a writ of certiorari to the United States Supreme Court." *Com. v. Fuchs*, 372 Pa. Super. 499, 539 A.2d 1307, 1311 (1988). There, the Superior Court held that a trial court lacked jurisdiction to proceed with a case including scheduling a matter for trial while a party had pending a petition for writ of certiorari to the United States Supreme Court. *Id.* The Superior Court likewise rejected the trial court's reasoning that the party was obligated to request a stay while the United States Supreme Court petition was pending. *Id.*

7. In light of clear directive of Pa.R.A.P 1702 (a) and the holding in *Fuchs*, any objection to a continuance of the pretrial conference would be frivolous.

WHEREFORE, defendant Neal Jacobs respectfully requests that the Court grant this motion and order the continuance of this conference by entering an Order substantially in the form attached.

Dated: November 24, 2004

STEVENS & LEE

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APPENDIX C — DEFENDANT NEAL JACOBS' MOTION FOR RECONSIDERATION OF THE MOTION FOR CONTINUANCE OF PRETRIAL CONFERENCE IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA DATED DECEMBER 28, 2004

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA

No. 00-6385

GEORGE P. VIENER,

Plaintiff

NEAL JACOBS, NORMAN RUSH, MICHAEL A. JOFFRED, ALLEN FRIEDMAN, N.G.N., INC., READING GARMENT COMPANY, INC., ELLMAR MANUFACTURING, INC., NEGAN LEASING, INC., ENERGY KNITS, INC. , READING DYEING AND FINISHING, INC., LITTLE CREEK MILLS, INC., LCMA, INC., AMITY FINISHING, INC., AND G.N.K. PARTNERSHIP,

Defendants

DEFENDANT NEAL JACOBS' MOTION FOR RECONSIDERATION OF THE MOTION FOR CONTINUANCE OF PRETRIAL CONFERENCE

Defendant Neal Jacobs ("Jacobs"), through his undersigned counsel, hereby moves for a continuance of the

hearing in the above-captioned matter presently scheduled and in support thereof avers as follows:

Final Appealable Trial Court Order

1. On October 25, 2001, the Trial Court entered an order denying post trial motions and entering judgment on behalf of George Viener ("Trial Court Order").

2. As a final order, Jacobs properly appealed the Trial Court Order pursuant to Pa. R. A. P. Rules 341 (a) and (b)(1).

Final Order of Superior Court

3. On September 3, 2003, the Superior Court affirmed in part, reversed in part, vacated and remanded the Trial Court's Order ("Superior Court Order").

4. Pursuant to Pa. R. A. P. Rule 1112(b), the Superior Court Order is a final appealable order.

5. Pursuant to Pa. R. A. P. Rule 1112(c), Jacobs properly appealed the Superior Court Order by filing a Petition For Allowance of Appeal to the Pennsylvania Supreme Court.

6. A Petition For Allowance of Appeal under Chapter 11 of the Appellate Rules concerning appeals from a final order differs from a Petition For Permission To Appeal under Chapter 13 of the Appellate Rules concerning appeals from interlocutory orders.

Appendix C

7. In is important to distinguish these two Petitions because the Rule cited in Viener's most recent motion to reconsider and many of the cases cited therein pertain to a Petition For Permission to Appeal and appeals from interlocutory orders – neither of which are applicable here.

Pennsylvania Supreme Court Denies Petition For Allowance of Appeal

8. On August 16, 2004, the Pennsylvania Supreme Court denied Jacobs' petition for allowance of appeal.

Denial of Petition of Allowance of Appeal to a Final Appealable Order

9. On November 12, 2004, Jacobs filed an appeal of the issues of the awarding punitive damages and of reopening the record to allow additional evidence to the United States Supreme Count by filing a petition for certiorari.

10. Pursuant to 28 U.S.C. § 1257(a), the Pennsylvania Supreme Court denial of Jacobs' Petition For Allowance of Appeal is a final appealable order capable of being appealed to the United States Supreme Court.

11. On November 29, 2004, the Trial Court granted Jacobs' motion to continue the pretrial conference after the appeal process is completed. Jacobs' counsel had faxed the motion to opposing counsel immediately upon filing.

12. On December 7, 2004, the Trial Court granted Viener's motion to reconsider and scheduled the pretrial

conference. The Trial Court entered the order a day before Jacobs' counsel even received the motion as the motion was filed and then mailed but never faxed by Viener's counsel.

13. Until the Supreme Court appeal is completed, the Trial Court lacks jurisdiction to proceed with a pretrial conference or, in the alternative, the Trial Court should in its discretion not hold such a conference until after the appeal is completed. If the United States Supreme Court accepts the appeal it could reverse or vacate the Superior Court Order or it may remand with specific instructions concerning the issues of punitive damages or a second trial. Both issues involve federal constitutional issues.

14. Except if a special exception is specifically prescribed in Pa. R.A.P. 1701(b), after an appeal is taken, "the trial court or other government unit may no longer proceed further in the matter." Pa. R.A.P 1701(a). None of the special exceptions are applicable here.

15. "Appeal" is defined in Pa.R.A.P 102 as "[a]ny petition or other application to a court for review of subordinate governmental determinations. The term includes an application for certiorari under 42 Pa.C.S. Section 934 (writs of certiorari) or under any other provision of law. Where required by the context, the term includes proceedings on petition for review." Therefore, upon the filing of a petition for certiorari with the United States Supreme Court, the Trial Court may no longer proceed with the matter.

16. The Superior Court has addressed this exact issue and held that the trial court lacks jurisdiction while a petition

for certiorari is pending. As the Pennsylvania Superior Court stated in holding that a trial court lacked jurisdiction while a petition fox certiorari was pending in the United States Supreme Court, "these rules clearly encompass a petition for a writ of certiorari to the United States Supreme Court." *Com. v. Fuchs*, 372 Pa. Super. 499, 539 A.2d 1307, 1311 (Pa. Super. 1988). There, the Superior Court held that a trial court lacked jurisdiction to proceed with a case including scheduling a matter for trial while a party had pending a petition for writ of certiorari to the United States Supreme Court. *Id.* The Superior Court likewise rejected the trial court's reasoning that the party was obligated to request a stay while the United States Supreme Court petition was pending. *Id.*

17. In light of clear directive of Pa. R.A.P 1701 (a) and the holding in *Fuchs*, a continuance of the pretrial conference should be granted. In his motion for reconsideration, Viener fails to even cite Fuchs, let alone distinguish it.

Viener Cites The Wrong Rule Which Does Not Pertain to Final Orders

18. Viener cites Pa. R.A.P 1313 claiming that "a petition for allowance of appeal to the Pennsylvania Supreme Court shall not stay proceedings before the lower court unless the lower court or the appellate court (sic) a judge so orders." Paragraph 8 (emphasis added). Pa. R.A.P. 1313 does not pertain to a petition for allowance of appeal (a petition from a final order); instead it is found in Chapter 13 and pertains exclusively to a petition for permission to appeal (a petition from an interlocutory order). No one can argue that the appeal

being pursued here is anything but an appeal from a final order. While we assume our able opposing counsel was simply hurrying to file the motion for reconsideration, the improper citation to this rule combined with the Court ruling on the motion without allowing a response by Jacobs, has caused significant prejudice to Jacobs.

19. None of the cases cited by Viener remotely support the theory that a trial court can proceed with a second trial while the results of the first trial – a final order – are sill on appeal to the United States Supreme Court. Instead, the cases cited stand for certain basic principals: absent a supersedeas, a trial court can (1) proceed when a petition for permission to appeal (interlocutory appeal), as opposed to a petition for allowance of appeal (final order) is still pending; (2) hold a party in contempt of the trial court's own order during the pendency of an appeal; (3) enforce its own order to require a party take certain actions or pay money; and (4) permit the civil execution process to continue. None of these principals are applicable here. Moreover, the Trial Court's prior order was vacated, and therefore, there is no trial court order to enforce.

20. A close examination of the cases cited by Viener reveal they do not support his agreement. For example, *Winpenny v Winpenny*, 643 A.2d 677, 679 (Pa. Super. 1994) involved a partition action. The trial court ordered partition, the Superior Court affirmed and the Pennsylvania Supreme Court denied allocatur. After the appellant exhausted all appeals on that issue, the trial court ordered appointment of a master in partition, the Superior Court affirmed and the Pennsylvania Supreme Court denied allocatur. *After* the

appellant exhausted these appeals, the trial court approved the master's acceptance of a bid to sell the property, the Superior Court affirmed and the Pennsylvania Supreme Court denied the petition. After the appellant had lost both phases on the partition action and had exhausted all appellate rights regarding such, the successful bidder moved the trial court to enforce the prior order, to which all appeal rights had already been exhausted. The trial court granted the motion to enforce the prior order, the Superior Court affirmed the interlocutory order and the appellant filed a petition for permission to appeal with the Pennsylvania Supreme Court.

21. While the petition for permission to appeal regarding the enforcement of the prior order was still pending, the master submitted a motion to the trial court for approval of the distribution, costs and master's fees. The trial court accepted the master's motion and the appellant appealed to the Superior Court arguing that the trial court should not have accepted the master's motion to approve distribution because, her petition for permission to appeal to the Pennsylvania Supreme Court concerning the enforcement order was still pending.

22. The Superior Court rejected the argument as frivolous finding that the appellant had already exhausted her appeal rights concerning both phases of partition and reasoned that the appellant misunderstood the duties of a master in partition. The Superior Court further recognizing in framing the issue that the prior appeal that had still been pending was on a "disparate issue." The issues concerning the partition had already been appealed and ruled upon prior to the trial court proceeding.

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23. In *Glynn v. Glynn*, 789 A.2d 242, 245 n.4 (Pa. Super. 2001), the Superior Court in a footnote noted that a trial court had authority to enforce the trial court's own contempt order even though an appeal was pending when the appellant had not obtained a supersedeas of the contempt order. There, in May 1997, the trial court ordered the appellant to make alimony payments under an agreement previously entered into with the trial court. No appeal was filed from the May 1997 order.

24. Subsequent to the May 1997 order and after the appeal time had expired concerning such order, the appellee moved to compel compliance with the May 1997 order and in September 1998 the trial court held appellant in contempt. The appellant appealed. While the appeal was still pending in September 1998, the appellee filed a second petition for contempt, which the trial court granted in May 2000 and a second appeal was filed. When ruling on the second appeal, the Superior Court in a footnote mentioned that the trial court could enter the second contempt order because it had the authority to enforce its own order even though an appeal was pending on the first petition for contempt.

25. *Tanglwood Lakes Community Assoc. v Lascowski*, 616 A.2d 37 (Pa. Super. 1992) was cited in *Glynn* and stand for the same proposition: a trial court can entertain a motion to enforce its prior final orders even though an appeal is pending. There, the trial court had ordered appellants to make certain payments and return certain real estate to its preconstruction condition. While an appeal of that final order was pending, the appellee filed a motion to hold appellants in contempt, which the trial court granted. On appeal from

the contempt order, the Superior Court once again recognized that a trial court retains authority under Pa. R.A.P. 1701(b)(2) to enforce its own orders. 616 A.2d at 39. Here, there is no motion to enforce the Trial Court final order nor could there be because that order has been, vacated.

26. *Monroe County Children and Youth Services v. Werkheiser*, 598 A.2d 313, 351 (Pa. Super. 1991), offers no help to Viener's argument. There, the Superior Court simply held that an appeal of a final trial court order terminating appellant's parental rights does not act as an automatic supersedeas to allow those rights to continue during the appeal. Likewise in *Tomimello v. James Way*, 573 A.2d 218 (Pa. Super. 1990), the Superior Court recognized that a plaintiff can execute against a money judgment while an appeal is pending unless a supersedeas bond is posted.

27. Here, Viener is not seeking to execute against a judgment. In fact, any judgment has been vacated by the Superior Court. Moreover, any possible execution on the judgment would be impossible because of the bankruptcy stay. For the same reason, Jacobs is not required to file – and in fact prohibited from filing – a supersedeas bond. Viener's argument that Jacobs is required to file a supersedeas bond is meritless as there is no execution proceedings, there is no judgment and there is a bankruptcy stay. See Bankruptcy Stipulation and Order attached as Exhibit A.

28. The above cited cases fail within the rule itself: 1701(b)(2) which allows a trial court to enforce its own orders such as by contempt or by the civil execution process. None of those cases stand for the unsupported legal theory that a

trial court can enforce a remand order of the Superior Court while the appeal is continuing before the United States Supreme Court.

29. Although Viener has not yet cited Rule 1701(b)(5) that also has no application here. Pursuant to 1701(b)(5), a party can file a motion with an appellate court to authorize the trial court to go forward with the case even while the appeal is pending and while the Superior Court retains jurisdiction. See Pa. R. A. P. Rule 1701(b)(5) (trial court can take any action directed or authorized on application/motion to the appellate court); *Montor Trail Council v. PaPUC*, 690 A.2d 703 (1997) (appellate court granted motion of appellant to allow commission to clarify its ruling while appeal was pending.) Viener never filed a motion with the Superior Court seeking to allow the Trial Court to proceed with the matter while the appeal was still pending with the Superior Court.

30. Here, the Trial court's Order was final, the Superior Court affirmed in part, reversed in part, vacated and remanded that Order and the Superior Court Order is considered final and Jacobs' appeal to the Pennsylvania Supreme Court was pursuant to Pa. R.A.P Rule 1112(b) (Superior Court order remanding to trial court is a final order) and 1112(c) (when Superior Court enters final order, appeal proceeds as a petition for allowance of appeal). The rule and cases cited by Viener that pertain to appeals from interlocutory orders and petitions for permission to appeal are simply not applicable in this case.

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31. If the Trial Court denies Jacobs' motion, then Jacobs requests that the Trial Court certify this order because the Court's ruling would contradict the Superior Court's holding in *Fuchs*.

WHEREFORE, defendant Neal Jacobs respectfully requests that the Court grant this motion and order the continuance of this conference by entering an Order substantially in the form attached. In the alternative, if the Trial Court denies the motion, then defendant Neal Jacobs respectfully requests that the Trial Court certify its order as an order involving a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter and enter the alternative proposed order.

Dated: December 28, 2004

STEVENS & LEE

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EXHIBIT "A"

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA

CHAPTER 7

BANKRUPTCY NO- 01-24739

IN RE:

NEAL JACOBS,

DEBTORS

CONSENT ORDER

AND NOW, this day of 21st, 2002, upon the consent of Michael Giles, Esquire, attorney for George Viener and Charles J. Phillips, Esquire, attorney for Debtor and upon consideration of the Debtor's Motion for Permission to Seek Reinstatement of Superior Court Appeal, and this Court being of the opinion and finding that the relief sought in the Debtor's Motion is appropriate and should be granted, it is hereby

ORDERED that the Debtor shall be, and hereby is, granted permission to seek reinstatement of his Appeal to the Superior Court of Pennsylvania to No. 1323 MDA 2001 and to prosecute the Appeal to its conclusion; and it is further

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ORDERED that George Viener is hereby granted relief from the Automatic Stay for the limited purpose of defending the Debtor's Appeal through the entire appellate process until a final, non-appealable Order is entered only; and it is further

ORDERED that the Automatic Stay shall remain in effect for all other purposes.

BY THE COURT:

s/ Thomas M. Twardowski
Thomas M. Twardowski

s/ Michael Giles
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